STATE OF MICHIGAN

COURT OF APPEALS

KEVIN KUKOLA,

Plaintiff-Appellee,

v

AIRPORT MEDICAL INDUSTRIAL CLINIC INC.,

Defendant[1]

and

RAJESH BHAGAT, M.D.,

Defendant-Appellant,

UNPUBLISHED
February 22, 2000

No. 208474
Wayne Circuit Court
LC No. 97-715421-NH

Before: Jansen, P.J., and Collins and J. B. Sullivan*, J.J.

PER CURIAM.

In this medical malpractice action, defendant-appellant Bhagat (defendant) appeals by leave granted from the trial court's denial of his motion for reconsideration of a previous order which denied his motion for summary disposition. Limiting our decision to the issue raised in defendant's application for leave to appeal, we affirm.

This case is before us for the second time. On May 24, 1993, plaintiff Kevin Kukola sustained an injury to his dominant, right hand while working as a fabricator for Contract Welding & Fabricating, Inc. Plaintiff was referred to and seen by defendant who performed surgery on June 7, 1993, and again on August 30, 1993[2]. Plaintiff's injury being permanent and severe, he filed this medical malpractice action on May 24, 1995. The trial court dismissed the case without prejudice on the ground that plaintiff failed to provide defendants with the 182-day notice of intent to commence the action as required by MCL 600.2912b(1); MSA 27A.2912(2)(1). This Court affirmed, but stated that plaintiff "may refile his claim immediately since the 182-day notice period has expired"(see n 2, sl op p 2). Plaintiff refiled his lawsuit on May 20, 1997, and defendant moved for summary disposition under MCR

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

2.117(C)(7) based on the running of the statute of limitations. The court denied defendant's motion "with prejudice," and this Court again granted leave to appeal "limited to the issue[ ] raised in the application." MCR 7.205(D)(4).

We review de novo a trial court's grant of summary disposition under MCR 2.116(C)(7). *McKiney v Clayman,* 237 Mich App 198, 200-201; 602 NW2d 612 (1999). We consider all documentary evidence submitted by the parties and accept as true the plaintiff's well-pleaded allegations, except those contradicted by documentary evidence. *Id.,* at 201. We view the uncontradicted allegations in the plaintiff's favor and ascertain whether the claim is time-barred as a matter of law. *Id.* Whether a cause of action is barred by the statute of limitations is a question of law that we also review de novo. *Id.* In general, the burden of proof rests on a defendant to establish all the facts necessary to show that the period of limitation has expired. *Warren Schools v W R Grace & Co,* 205 Mich App 580, 583; 518 NW2d 508 (1994). The limitations period is tolled on the accomplishment of jurisdiction over the defendant. MCL 600.5856; MSA 27A.5856. The tolling statute applies to prior suits that have not been adjudicated on the merits. *Morrison v Dickinson,* 217 Mich App 308, 318; 551 NW2d 449 (1996). A dismissal without prejudice is not considered to be an adjudication on the merits, and therefore the tolling statute applies. *Id.* A limitation period is tolled during the pendency of an appeal. *Id.,* at 319.

Generally, a plaintiff must commence an action for malpractice within two years of the claim's accrual. *Id;* MCL 600.5805(1), (4); MSA 27A.5805(1), (4) and MCL 600.5838; MSA 27A.5838. See, *Solowy v Oakwood Hospital Corp,* 454 Mich 214, 219; 561 NW2d 843 (1997). In 1986, the Legislature abrogated the "last treatment rule" for accrual of medical malpractice claims, redefining accrual as "the time of the act or omission which is the basis for the claim." *McKiney, supra,* at 203; MCL 600.5853a(1); MSA 27A.5838(1)(1).[3] The change reflected the Legislature's "clear rejection of the notion that the existence of a continuing physician-patient relationship by itself could extend the accrual date beyond the specific, allegedly negligent act or omission charged." *McKiney, supra,* at 203. Because the accrual date depends on the basis of a plaintiff's malpractice allegations, we examine the complaint to determine the accrual date. *Id.,* at 202.

In *McKiney,* the plaintiff was treated by the defendant dentist from June, 1989, to December 3, 1993, for recurring sores or lesions on her tongue. Notwithstanding that the initial procedure removed a cancerous growth, the defendant assured the plaintiff that she did not have cancer. On December 2, 1993, the plaintiff received a tentative cancer diagnosis from other doctors. However, at the plaintiff's last visit to the defendant on December 3, 1993, he remained of the opinion that the plaintiff did not have cancer. A March, 1994, biopsy confirmed the cancer. The plaintiff's malpractice action, filed on December 21, 1995, was dismissed based on the running of the statute of limitations. On appeal, the plaintiff claimed that, because she received treatment by telephone through March 3, 1994, her action accrued on that date. This Court found that the plaintiff's position ignored the statutory language defining accrual as the time of the act or omission which is the basis for the claim, and ignored the Legislature's clear rejection of the notion that the existence of a continuing physician-client relationship by itself could extend the accrual date beyond the specific act or omission which formed the basis of the claim. *McKiney, supra,* at 203. This Court carefully reviewed the plaintiff's testimony regarding those

discussions with the defendant, but concluded that the testimony "[did] not allege any new, distinct negligent acts or omissions by [the] defendant in the early months of 1994," *id,* at 207, that the plaintiff's malpractice claim accrued on December 3, 1993, and that her December 21, 1995, claim was barred by the statute of limitations. *Id.*, at 209.

In the instant case, both plaintiff's original complaint and his refiled complaint allege, *inter alia,* that the surgery performed by defendant on June 7, 1993, "was premature and before the patient's condition had sufficiently stabilized to permit surgery," and that the August 30, 1993, surgery occurred "after the passage of two and one half months of no progress when the standard of care required the passage of four to six months." The record indicates that defendant continued to treat plaintiff at least through November 29, 1993. However, even if we determine that plaintiff's cause of action accrued no later than the second surgery on August 30, 1993, plaintiff's complaint still was not barred by the statute of limitations. Simply put, the statute started to run on August 30, 1993, stopped when plaintiff filed his original complaint on May 24, 1995, started to run again on April 8, 1997, when this Court released its opinion following plaintiff's appeal on the notice issue, and stopped again when plaintiff refiled his complaint on May 20, 1997. At that point, plaintiff still had approximately six weeks in which to file his complaint and still be within the two-year statute of limitations. The trial court did not err in denying defendant's motion for summary disposition based on the statute of limitations.

Because this appeal is limited to the issue raised in the application, the other claims of the parties are not properly before us. MCR 7.205(D)(4); *Bass v Scott, et al,* ___ Mich App ___; ___ NW2d___ (No. 201367, rel'd 10/8/99, sl op, 4).

Affirmed.

/s/ Kathleen Jansen
/s/ Jeffrey G. Collins
/s/ Joseph B. Sullivan

[1] Defendant Airport Medical Industrial Clinic, Inc, has been dismissed from this case.

[2] We note that this Court's prior opinion in this case (Unpublished opinion No.189088, rel'd 4/8/97) does not refer to the August 30, 1993, surgery. However, the record is abundantly clear that appellant performed a second surgery on that date.

[3] MCL 600.5838a(2); MSA 27A.5838(1)(2) provides that a medical malpractice action "may be commenced within the applicable period prescribed in section 5805 [two years of accrual] . . . or within six months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later." In the instant case, the discovery date is not at issue.